

TABLE OF AUTHORITIES CITED

Cases

	Page
American Stainless Steel Co., v. Ludlum Steel Co. 294 Fed. 103	47
Cantrell et al., v. Wallick, 117 U. S. 689.....	49
Carnegie Steel Co., v. Cambria, 185 U. S. 403.....	48
Diamond Rubber Co., v. Consolidated Tire Co., 220 U. S. 428	48
Ives v. Hamilton, 92 U. S. 426.....	48
Kurtz v. Bell Hat Lining Co., 280 Fed. 277.....	48
Loom Co., v. Higgins, 105 U. S. 580.....	46
Minerals Separation, Ltd., v. Hyde, 242 U. S. 261.....	47
Mowry v. Whitney, 14 Wall 620.....	48

Statutes

Judicial Code Sec. 274d, title 28 U. S. C. A. s. 400	6
Act of June 19, 1934, s.651 #1.....	36

Exhibits

Ballou patent in printed transcript (44 to 47).....	12
Decision of Board of Appeals, in printed trans- cript (52 to 53).....	12, 13
Goodsell-Maynard in printed transcript (138 to 139)	14-16
Walsh-Caprio, in printed transcript (154 to 156)	4, 5, 13

SUBJECT INDEX

	Page
Petition	1
Opinions	2 to 5
Jurisdiction	5
Short Statement of Case	6
Mandate, Examine Writ for Approval.....	8
Mistakes between Courts	8 to 11
Questions Presented	11
Reasons for Granting Writ.....	12
Bank-teller can not accept.....	14
District Court Blames Defendant.....	17
Cutting-off of Testimony	19 to 20
Rackets	22
Invention p. 15; X, p. ²⁴ / ₂ and more about it.....	28, 29, 30
Difficulties	31, 32
Unduly Long Case 19-8/12; p. 20 ; p. 21; p.33; p. 40	24
Supreme Court of the United States.....	31, 32
Prayer (Oath 38)	37
Brief—Opinions and Judgments	39
Invention and Cases Supporting It.....	41
(a) Distinction, (b) left out compounded (1) (2)	41
(c) not in prior art, preposterous	42
(d) Ballou alone has it, and law applied.....	46
(d-1) known elements, (d-2) skilled man.....	46
(d-3) broad, variation; (d-4) mistaken.....	47
(d-5) combination; (d-6) evidence of invention	49
Jurisdiction	52
Conclusion	53

IN THE
Supreme Court
OF THE
United States

OTTO H. KRUGER,

Petitioner,

vs.

NED WHITEHEAD, doing business
under the fictitious name of WHITE-
HEAD & CO.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO RE-
VIEW THE JUDGMENTS OF THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT (11008), AND OF THE
UNITED STATES DISTRICT COURT, SOUTH-
ERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION (3116-BH).**

To the Honorable, the Chief Justice, and the Asso-
ciate Justices of the Supreme Court of the United
States:

Your petitioner, Otto H. Kruger, prays that a writ
of certiorari issue to review the judgments of the
United States Circuit Court of Appeals for the Ninth
Circuit (11008), and of the United States District
Court, Southern District of California, Central Divi-

sion (3116-BH), as contained in Court-Statements, delayed-Opinion, and mistaken Appeal-Opinion, to wit: (a₁)—*Trial - Court Trial-Day - Finale* — “Distr.-Ct.: While the patent has been referred to as a simple patent, yet it indicates that there has been an improvement here of technique in the making of identification cards which have some features that are quite unique” ((in printed transcript (133-1/4)). (see also page 6 here under date Oct 16 1944) ;—

(a₂)—“*Distr.-Ct.*: Gentlemen, I am going to require briefs in this case, so that I will have them before me. I am willing to have any discussion of that subject matter that counsel desires to offer.” (132-4/7;—

(a₃)—“*Distr.-Ct.*: It is just argument, that is all, a form of witness’ testimony” (132-16/17) ;—

(a₄)—*Memorandum-Opinion* of same court (20-21 transcript)

(b)—*Opinion of Circuit Court of Appeals for Ninth Circuit*, recopied from one received from the then-counsel—

“Before: Stephens, Orr and Wilbur, Circuit Court Judges.—Wilbur, Circuit Judge:

“This is a proceeding for a declaratory judgment brought by the manufacturer of an identification card which the defendant claims to be an infringement of his patent No.—2,088,567, applied for October 22, 1934, and issued to him August 3, 1937, as assignee of the inventor, John Mck. Ballou. The defendant counter-claimed for infringement. The claims of the patent

were based upon the printing of the identifying card with an ink that would be dissolved by any solvent which would dissolve the celluloid, or similar material in which the card was encased, thus disclosing that the card had been tampered with. The enclosing of a card with printed matter thereon in such transparent material was not, and is not, claimed to be novel. It is shown in patent No. 1,071,226, issued to Goodsell and Maynard August 26, 1913. It is in the choice of ink that the patentee claims the invention lies. The evidence shows that there was no other kind of ink in existence. That is, every known ink would be so affected by any chemical capable of dissolving the transparent envelope containing the card adhering thereto. The trial court, in a terse opinion, held that there was no invention and that if there were it was not disclosed as required by law. The findings of fact followed the opinion and the court decreed claims 1, 2, 4 and 5 of the patent to be void and enjoined the patentee from representing to the trade that the identification card manufactured by the plaintiff infringed such patent.

The defendant appeals. He claims that "the court overlooked a vital distinction. Substantially 'affecting' an ink does not fulfill the requirement of the patent nor the language of the claims. The identifying inked matter must be distorted. (The patent claims specify 'dissolvable'.) Even if all inks are 'affected' by a given solvent, only some of them will reveal distortion by bleeding."

The patentee does not name in his patent specifica-

tions or claims the ink which is to be used in the patented card, nor describe it otherwise than by its one characteristic which is that it will be dissolved by any solvent that will dissolve the card's container.

Further description he claims is unnecessary for, as he correctly states, such solvents are well known to those trained in the art. Wherein, then, lies the invention? The election of known materials is not itself an invention.¹ The patent does not inform persons familiar with the art how to utilize the patent. They are left to make their own selection of material and their own experiments to practice the invention. Complete disclosure is the price paid for the patent's temporary monopoly. The truth is that all the patentee had was an idea that the use of a solvent ink on an identification card would tend to prevent counterfeiting. Mere ideas are not patentable; it is the means for carrying the idea out that is patentable.²

The patent to Walsh and Caprio, No. 2,079,641, describes a process and a manufacture identical with that of the patent in suit. The difference is that Walsh and Caprio, knowing that practically all inks are soluble and bleed when treated with a solvent that will affect the transparent cover of a card containing printed matter, sought to overcome the bleeding which might result during the process of manufacture by inserting a cement between the printing on the card and the

¹Sinclair & Carroll Co., Inc. v. Interchemical Corp., 325 U. S. 327.

²Measuregraph Co. v. Grand Rapids Show Case Co., 29 F. 2d. 263, 275.

transparent envelope. It is clear that if the card or product manufactured by the process described in the Walsh and Caprio patent were submitted to a solvent which would dissolve the transparent envelope containing the card the printed matter on the card would dissolve or bleed, and thus meet the claims of the patent in suit. To use the patent combination or device of Walsh and Caprio for a new purpose does not amount to invention.³ The findings of fact (Nos. 2 and 11) that there is no invention in defendant's patent must be sustained.

The patent in suit does not disclose or describe the invention as required by Rev. Stat. 4888; id. 35 U.S.C. #33, and for that reason also is void.

Decree affirmed.

(Endorsed:) Opinion. Filed Feb. 6, 1946. Paul P. O'Brien, Clerk."

JURISDICTION

The jurisdiction of this Court is invoked under information from the Office of the Clerk Supreme Court of the United States that a petition for a writ of certiorari may be filed to review the judgment of the Circuit Court of Appeals provided it reaches the Office within three months from the date of that judgment.

³(see *Ferdinand DeSt. Germain v. Emanuel Brunswick*, 135 U. S. 227); *Grand Rapids Show Case Co. v. Weber Show Case Co.*, 38 F. 2d, 730, CCA9; *Farmers Co-op. Exch. v. Turnbow*, 111 F. 2d 728, CCA 9.

The *effective* date of the judgment and decree could not very well be before having final notice that no further action can be had, since petition for review had been (C.C.A. 9)—acknowledged and held in abeyance so as to lead petitioner to believe to have to expect a review in due time; and since a petition to the Supreme Court could not very well be made while a petition was still before the lower Court. ((—(—) mine)) (only for emphasis) (pp. 7-11—

SHORT STATEMENT OF THE CASE

An action under the Declaratory Relief Act (Judicial Code, Section 274d, Title 28 U. S. C. A. Section 400) was brought against the petitioner on August 27, 1943 by the plaintiff-appellee-respondent Ned Whitehead, doing business under the fictitious name of Whitehead & Company.

On April 21, 1944, the defendant-appellant-petitioner Otto H. Kruger duly served and filed an answer and counter-claim under his patent 2,088,567.

On September 7, 1944, a trial was had before the Honorable Ben Harrison, Judge of the District Court.

On October 16, 1944, five or more weeks after trial and *Court-Statement in favor of Kruger*; the District Court rendered a *Memorandum Opinion against Kruger*.

On November 15, 1944, final judgment in favor of Whitehead was rendered.

On February 9, 1945, notice of Appeal was filed with the Circuit Court of Appeals Ninth Circuit.

On February 6, 1946, the C.C.A. 9 rendered an opinion of which a copy is indicated in pages 2, 3, 4 and 5 hereinbefore; a printed copy of this having been forwarded to Kruger about February 14, 1946 by the then counsel of Kruger.

On March 1st 1946, this counsel gave written notice of withdrawing from the case, leaving Kruger deserted at the most inopportune moment. So far, each and every counsel introduced had only made the case so much more confused, Kruger having had great difficulties of getting any counsel and the counsel's action in Court during the trial is well-enough self-explanatory as to what Kruger was able to retain. Kruger could *not possibly get other counsel* to expect any better showing for reasons to be set forth hereafter;* and, by submitting this point of view, Kruger was allowed to submit his case personally in typewritten form as a consequence; Kruger having been denuded of all means even having had to sell his much-needed car, paying this last counsel \$1700.00, though, perhaps, more was wanted and needed, to make proper efforts. (*pp. 31, 32, 33 here)

This last counsel's letter, but more clearly verbally when Kruger called at his office; emphasizing that I had no recourse what-so-ever with the U. S. Supreme

Court, clearly contrary to Official information just received; or I would otherwise have submitted this petition at that very time.

On March 6, 1946 a petition for rehearing was filed instead, with the Circuit Court of Appeals.

On April 16, 1946 the petition was denied.

On April 23, 1946 C.C.A. 9 sent notice of a mandate having been filed with, and being held by, the District-Court, the notice reading—

“For your information in the matter, I beg to advise that the mandate of this Court under Rule 28 in above cause was this day issued and forwarded to the Clerk of the Court below.

“Please *examine* the writ forthwith, and if the same does not meet with the *approval* of the court, yourself and counsel opposed, the same should be *promptly returned* to my office with advices and appropriate suggestions, (sign. etc., Clerk C. C. A. 9)

On May 2, 1946 an “objection” was filed with both Courts, acknowledged by C. C. A. 9 of May 4, 1946.

Complying with the notice to “examine the writ”, on calling at the Distr.-Ct.-Clerk’s office, not getting any desired information, and not hearing anything; Kruger inquired by mail under date of June 20, 1946, to which came—

“June 18, 1946 Deputy-Clerk Distr.-Ct.—In answer to your letter of June 17, 1946, with regard to procedure to get above matter on the calendar,

please be advised that the records in my office show that the *mandate was recalled to the Circuit Court of Appeals and leave granted appellant to file for rehearing in typewritten form.* Therefore, it appears that you should inquire of the clerk of the higher court as to the procedure in this instance —”

This letter and the following should not be looked at in the light of criticisms or accusations but only as an effort to beg for an understanding on timely delays, though also showing the leave for typewritten form.

“June 19, 1946 clerk of C. C. A. 9—addressed to clerk of Distr.-Ct.—I acknowledge receipt of copy of your letter dated June 18, 1946 to Mr. Kruger, and to advise that the mandate of our Court was reissued on April 23rd, and is no doubt in your files.”

June 20, 1946 Kruger filed promptly with C.C.A. 9 copies of “Question on Delays”, which had been submitted to Distr.-Ct.—under date of June 10, 1946, and of which copies had also been submitted to opposition, receiving—

“June 21, 1946 clerk of C. C. A. 9—

I acknowledge receipt of your letter dated the 20th instant, enclosing original and three typed copies of “Petition for Reconsideration”.

“The petition for rehearing filed by you on March 14th was denied by the court on April 16th and the mandate of our court reissued to the Distr.-Ct. on April 23rd.

"If, in view of the above you desire me to pass your documents to the Court, I shall do so.

Please advise me." (emphasis mine)

not possibly to be taken by me of any sort of closing the case so far.

"June 21, 1946 Clerk Distr-Ct.—In answer to your letter of June 17, and supplementing my letter of June 12, I wish to advise that the mandate in the above case has been received from the Circuit Court of Appeals, and is being held by me pending its being spread upon the minutes of this court.—"

Accordingly, a motion for review was filed promptly, but, at the hearing, Distr.-Ct.—insisted not having any authorities, etc., but gave a week for me to produce a better showing. (Ct.—going on vacation before date)

August 20, 1946, distr.-Ct.—denied review, under "*examine*"- mandate from C. C. A. 9, *ignoring cases*.

..... August 20, 1946, distr.-Ct.—denied review, un- mistakes was then promptly filed with C. C. A. 9, and thus acknowledged August 27, 1946.

However, nothing further having been received, a status letter was submitted as to getting review on October 15; and another inquiry on October 28th, to which came—

"C. C. A. 9 October 30, 1946: I have your favor dated the 28th instant, enclosing original and copies of "On the Petition for a Review of August 24, 1946"

Again, months passed without any action, though no denial, or closing of case; causing me to ask again on status of case, receiving—

“May 12, 1947, Clerk C. C. A. 9: I have your favor dated the 9th instant, which I have read with interest, and beg to advise that your CASE, as far as our Court is concerned, IS CLOSED.”
(emphasis mine)

QUESTIONS PRESENTED

1. Should “Justice” not have at least a part in Court actions and in Judgments? (besides observance of law)?

2. Considering all circumstances, could it possibly be held that “Justice” had any part in this case?

3. How can a patent be deemed to be adjudged if there was no judgment on the gist of the invention?

4. With all this in view, is there really any judgment in this case?

5. Did the layman-petitioner really delay actions in any real sense of the word, considering all the above questions? (and the mistakes between Courts-) (8-11).

6. If it be found that opposition caused most of the confusions, and even the Courts were not entirely free of giving undue difficulties to petitioner; should a certiorari not be justified now?

7. Considering the real facts and real evidence in this case, should both of the previous judgments not be reversed?

8. Should the Ballou patent not be deemed to be valid and to have been deliberately infringed with full knowledge of the respondent?

9. Should the petitioner not be entitled to a proper reimbursement of his expenses in this case; together with an accounting from the respondent, and an injunction against the respondent?

REASONS FOR GRANTING THE WRIT

In the Opinion of C. C. A. 9, as copied on page 4 herein-before, line 6—

“correctly states, such *solvents are well known*” (referring to Kruger’s contention).

The Ballou patent application had been given special attention, to get it beyond the Primary Examiner, to the Board of Appeals, getting a Decision—

“*references show the solubility of the ink*” (53-22/23 of printed transcript)

“adoption of this idea in Goodsell-Maynard would have no object at all” (53-24/26).

The Appeal-Board Decision was purposely made the principal exhibit by Kruger, to show a known fact in prior art.

Testimony during trial called attention to it—

“Distr.-Ct.: *Solvents* that would affect ink—
more or less common knowledge”. (102-11/13).

Notwithstanding, the Court asserted unwarrantly
by its own assumption, practically *presumption*, con-
trarily—

“Distr.-Ct.: *gist* of the patent is the *discovery*
of a solvent” (20-12/13);
on which the Court unduly, not to say worse things,
concluded—

“As a matter of fact I feel no discovery was
made” (21-19/20). (*NOT ON SOLVENT! NO!!*)

Of course not! Kruger said so in Depositions, long
before trial, to Lyons; and ever since, in Court repeat-
edly;—but *C. C. A. 9* holds:

“decree affirmed”. (*How could that be*, when *C.*
C. A. 9 said “*well-known*”, but Distr.-Ct.—“*Sol-*
vent gist of invention”, showing *extreme diversity*
of OPINION??). (p. 12, *C. C. A. 9*).

Furthermore, *Distr.-Ct.*—also said:—

“I want to say frankly that I am not impressed
much by the prior art” (135-3/4);—
but the *C. C. A. 9* said:

“*manufacture identical* with that of the patent in
suit” (lines 20/21 of page 4 herein-before).

Is that, too, *affirming decree* of Dist.-Ct.—having
expressed and held against prior art?

Though comparing our patent 2,088,567 with the
Walsh-Caprio-patent; “*identical*” really refers to a

*mere picture, with which even a Judge would hardly be willing to embarrass himself before a Bank-teller, who might agree that the picture is pretty, perhaps not laughing the Judge in the face but, politely asking whether the Judge had not *other* identifications on him, and that notwithstanding that the Judge might have typed his name on such picture, in the manner indicated in the Goodsell-Maynard patent, on which the Patent-Office Board of Appeals ruled quite intelligently as on page 12, here under (53-22/23 and (53-24/26.)*

In fact, there is no personal identification in either, Goodsell-Maynard nor Walsh-Caprio (1,071,226 and 2,079,641); and there is nothing to co-act within any sort of identification-matter with any sort of a vouched-identity of the bearer of a card, such as in the Ballou-patent. Walsh-Cement prevents bleeding.

The Lyons know, and knew, this all too well. They had cited several checks, but dropped them like hot potatoes, two (142 and 146) being still in printed transcript but without supporting-testimony or anything for explanation, the Lyons well enough aware, that Kruger's answers should have made it clear enough to anybody, and Lyons only hoping that Courts will not stumble on to the facts, that, no matter if a bearers' name is on a check, and/or all the so-called safety-paper, and/or the fanciest coloring is used,—it still does not make a check any sort of identification.

The Bank-teller will still want your identification.

The Ballou patent makes it quite clear that direct co-action is the paramount essential, as set forth in lines 36 to 41, first page of the patent, (45 of transcript), the personal designation, indication, representation, presentation, or what-have-you,—called—

“original and distinctive with or by the holder”;—is not *all*, or the *only* thing; but—

“*furthermore*” line 43;

something—

“to be quickly and readily recognized as *such*”
(lines 43-44);—

as such *as*—

“reliable identification” (line 42);—

and the designation of the holder must be in direct co-action with some *such* “readily recognized”—*vouch*.

The patent is very elaborate from there on, and is really saturated with any and all sorts of information any man skilled in the art could possible ask for, and, particularly, such as recited as suggestive in part, in lines 18 to 26 in the second column of the patent.

But, all these things *must*, and *will*, co-act, if arranged as in lines 29 to 37 on page 2 of the patent, (46 of the transcript).

Then, indeed, all this will assure the result as set forth in lines 63 to 73. (46)

It is hard to believe that so much elaborate detailing should not have been enough for such old practitioners, as the Lyons; but we may be sure that they comprehended; otherwise, they would not have dropped things

just like hot potatoes whenever answers came near enough to knock out their pet references. They did not dare to bring any expert, as he would have had to admit the fallacy of their pretence. Their's is a pretending game, more to come.

Came, however, *Lyons* to read us some phrase out of the Goodsell-Maynard-patent, to say that—

“the interposed identification device, as it has been termed, may bear printing on both sides.

“For instance, in the case of a horticultural (y) *label, on one face* of the identifying device could be printed the *name* of a flower or something of a similar character or even a symbol; while the (z) *opposite face* might bear *advertising matter* of a florist or nurseryman.”

((y) and (z) and emphasis being mine))

Nevertheless, the *Lyons* seem to pretend to overlook that this is nothing more than what has been illustrated in the drawing of that patent;—

(y)—one face showing *one thing only*, and—

(z)—the opposite face, too, showing *one thing only* (subject to being split) (easy forgery)

Neither face has anything to co-act by which to prevent forgery; even with bleeding ink *unduly* added.

Neither face, by itself, has any sort what-so-ever of any *vouching*.

In *plain common sense*, the *tree* was not supposed to identify the nurseryman's name; or particularly, to *identify the nurseryman*.

Neither was the man's name supposed to identify the tree. The thing, tag or label, was merely to *weatherproof* the *label*, second column, page 1, of the patent, (139 of transcript) lines 83-84, 87 etc.—(85-3/4 CT.)

There was no such a thing in the mind of Goodsell-Maynard, as preventing forgery, or having proper co-acting in each face, or both faces, independently of one another, as ruled intelligently by the Board of Patent-Office Appeals (53-22/26) (lines 19 to 22 hereinbefore, previously given in full, (turn back to p. 12)

Having already referred to—

“Distr.-Ct.: *gist* of the patent is the *discovery of a solvent*” (20-12/13);—

it must strike as contradicting—

(Distr.-Ct.) “The *problem, according to the defendant* was the *finding of certain inks*” (21-20/21);—

or is “*gist*” not a “*problem*”? (Which is what?)

Moreover, it must be deemed to be nonsense in view of expert's testimony, of which the *Court said*—

“appears to be a very well informed man” (134-7;—and—

“I am accepting the testimony of the patent holder's expert” (in Court-Opinion 21-14/15); the expert having testified—

(Expert)—“for the ink manufacturer it would be the most simple kind of task” (94-28/29).

The *Blaming* of the defendant by the Court for the *evident nonsense* must be deemed unjust, to say the least.

It, moreover, must be flabbergasting, and also shocking, to any honest mind, to blame the defendant of having seen any sort of problem in things that he always pointed out as having been known in the art; while, in fact, the *true evidence* in this case shows extremely and definitely quite the *contrary to both Court-assertions*, as against discovery of solvent, or finding of inks.

The Court received repeatedly correcting answers from the testifying defendant by and to the Court's own investigatings on these very questions—

“Distr.-Ct.: What other feature of the invention do you claim is new besides that fact?” (62-18/19;—

to which the Court received definitely and undisputedly the *true gist of invention* by defendant's answer—

“The feature of having a compound identification that is *interacting*” (62-20/21).

In an informed mind, it should have cleared the question—

“Distr.-Ct.:—Isn't the essential element of this patent that you are claiming the fact that the card beneath this celluloid material is subject to being dissolved by the same material that dissolves the cover?” (62-13/16;—

being answered as short as possible—

“That is a correct part of the invention” (62-17);

the witness having already been intimidated, and put on guard, by having been cut off unduly—

“page—” (62-3);—

the Court cutting in—

“Let us get the evidence, then I will listen to the argument” (62-4/5);
though the above (62-3) could have been completed easily, to have given in short the easily distinguishable features as claimed, with the reference to explanations in specification, in a very short time; in the manner set forth in page 15 herein-before.

The *testimony might have been worded better* if defendant had been *allowed to ever finish his answers* in proper sequence, without such constant interference and undue *cutting off*—

“now the —” (62-19);—

the Court cutting in—

“Just a minute” line 20;—

and again cutting off—

“If the—” line 28;—

the Court cutting in—

“Just a moment” line 29;—

and again cutting off—

“and also—” line 2, page 63 of transcript;
the Court cutting in—

“Not What? (63-3);—

though this all could be believed to have been unintentional and only due to anxiety by the Court of wanting

information; but it could not possibly justify the Court's criticism at another time, addressed to defendant's counsel—

“Distr.-Ct.: you are not going to place the responsibility on the court for the witness not telling his whole story” (131-25/27);—
while the witness had, in evidence, shown to have been more than willing to tell his story, if only the Court had not cut off the sequence of the story; in addition to the first answer on the previous page 18 here, the witness had also said—

“And if the identification *matter* were not *compounded*” (63-1/2).

In answer to the Court's—

“Not what?” (63-3);—
answer *rushed*, to not be cut off—

“That the different parts of the identification, *this part* of the person's identification, and *this part* of the person's identification are *co-acting* under the same solvent.

“A *co-acting* feature, as I say, is absolutely essential.” (63-4/7).

During all this, the testifying defendant had been referring to parts of the copy of the patent in issue in the hands of the defendant.

The Court distorting, or misquoting even (63-4/7)—

“That is what I am trying to say in a layman's language, that this card could be put between two

pieces of celluloid material, such as we have here, and clamped with heat and pressure, and if the printing matter were not subject to being dissolved by the same solvent that dissolves the cover, *you wouldn't claim* it was any novel feature, would you?" (63-8/14);—

which the witness could only correct—

"*to quite an extent*, your Honor" line 15.

There could, and would, have been a clear case before Court, and in the record, *without all the stuff of irrelevant injections by the opposition*; and there would not have been wedged-in, rushed, evidence; to have made unnecessary the undue Court-outburst—

"Distr.-Ct.: You have spent an hour and a half, and I haven't learned one thing yet that hadn't already been called to my attention in the *pre-trial statement*, and from a study of it again." (86-16/19).

Yes, in my pre-trial brief, demanded by the Court, I had given a clear picture of facts, showing that the Lyons had been in communication with me on this identification ever since before the patent issued, though they do not inform a new client of their own knowledge of art, according to sworn statements on their side; and I had answered every patent cited by them; but, with such and similar criticisms, as above, defense-counsel came to the point of *daze*—

"Defense-counsel: I understand the Court doesn't care to hear any testimony as to what these patents cover, and the other files, that you

are sufficiently familiar with them?" (131-17/20);—

the Court's answer being self-explanatory—

"Distr.-Ct.: I don't know that I understand them. *I am not going to foreclose you.* But I don't need an expert to tell me what the English language means. *I am not going to foreclose you.* I will pass on it when the time comes. In other words, you are not going to place the responsibility on the court for the witness not telling his whole story" (131-21/27). (plain Engl. p. 15 & 16 here)

That such general attitude prevailed throughout the trial is, perhaps, best explained—

"Distr.-Ct.: I think it is one of the greatest *rackets* in this country, myself" (66-67); clearly applying to *a little man trying to get profit* out of a patent; when such is *the very foundation of our Patent Laws*, largely *in agreement internationally*. (not just in this country at all, even if a Court says it) explained—

"Distr.-Ct.: I don't know whether I understand it thoroughly. I never examined a patent yet when I felt that perhaps I understood it thoroughly, and my experience has been that counsel is generally in the same position" (57-16/19);—admitted layman, calling all counsel ignorant?!

No wonder, opposition-counsel got bold, when Court, perhaps unwittingly, helped the opposition, in creating nothing but confusion in Court and in the case; the opposition daring—

“Frederick S. Lyon: We object to that, your honor, as *incompetent*. In this case the *patent speaks for itself* and states what it is” (57-5/7);—
(*Why not let it speak?*)

answered, and yielded to—

“Distr.-Ct.: I think the objection is good. The *patent speaks for itself*, counsel.” (57-8/9) addressed to defense-counsel).

No wonder, the defense-counsel became dazed. Why, then, did the Court recite the whole claim twice (57) and (60)? with an air and attitude of wanting answers to it?—while the Court, at such important moments, though otherwise asking defendant directly, contrarily, rebuking witness-defendant—

“Distr.-Ct.: *No*. I am asking counsel” (60-11);—
and also contrarily—

“Distr.-Ct.: *Just a moment*. Let counsel do the arguing and talking. You are a witness now” (65-19/20).

It would take a strong mind, in view of—

“Distr.-Ct.: We are going in a very haphazard manner, partly argument and partly evidence.” (62-5/6);—
considering the many pages of the printed record, directly under leadership, and almost urging, from the Court—

“Distr.-Ct.: But isn't this a fact, that there was no patent cited here that had this bleeding ink feature?” (84-11/13);—

and though the answer was wedged in—

“Witness-defendant: Yes sir; there was no bleeding ink feature in any identification card previously” (84-15/16);—but again —
the Court was *leading* into a *long argument* of *pages* in the record; even contradictory, self-contradictory, and nonsensical mere argument; both plaintiff-counsel contradicting each other and contradicting themselves in their individual statements;—*instead of—*
allowing the witness-defendant to bring, and complete, his evidence, then, and first, *while he was on the stand*, and without undue interruptions.

A forger knows well enough that stable ink gives him no difficulties, he can pick out what he wants; but he also knows that bleeding ink will run out, and he will not even attempt forgery.

The Lyons know well enough that—

——the ink alone is not the gist of this invention; but consideration should be given to—

- (a *compound* structure of the identification—
- (proper, containing personal designation, and,
- x-(*FURTHERMORE* vouching means;
- (in its absolutely essential parts, *co-acting*;
- (by which an *ink* can be made to become effective
- (in conjunction with such a *compound* structure.—

The Lyons did not worry, as long as the Court could be kept arguing, such as—

“Distr.-Ct.: I am a layman, when it comes to this special art, but when he tells me that a certain patent is in a different field, or that it is not really

prior art in so far as his patent is concerned, that is a question for me to pass upon.” (85-22/28);—
contrarily—

“Distr.-Ct.: But he can explain the workings of *this* patent, *explain anything about the art*, and *I am interested*, because I am a layman, when it comes to this special art” (85-22/25);—
and then again contrarily—

“Distr.-Ct.: Well, I think it is a question for the Court, *I am not much interested* in the expert telling me how I am to construe those patents” (84-9/11);—
and again—

“Distr.-Ct.: I feel that an expert can tell me anything he wants to tell me, but when he starts to make his conclusions as to the effect of certain cited patents he is intruding upon my function, because, after all, that is something that I am going to have to determine” (85-10/14).

How could it possibly be done otherwise than by comparing with, or distinguish over, old, or other art?

“Distr.-Ct.: As I understand the law, those claims must be considered *with* the evidence”.

Fine and good; but, without listening, or without giving any consideration to the contention of the defendant; how can an admitted layman get an unbiased view of both sides? How can he determine difference? or pass upon novelty, novel over what? Without comparing with prior art, *without* the help of *contentions* from *both* sides?

Just by accepting the *evident-untrue, unsupported, unproven, mere assertions of an untrustworthy counsel?* or his just as untrustworthy client? as evident from this and the next page 27, to result in—

(20-12/13) herein-before pp. 13 and 17;—

(20-20/21) herein-before p. 17.

Is the following boldness, then, surprising?—

“*if it is a bleeding ink*” (64-16) (Fred. S. Lyon)
(the Lyons thereby admitting to know other than bleeding inks);—

“*No*” (66-10) (F. S. Lyon);—

“*It positively will not*” (66-11) (F. W. Lyon);

“*All ink will dissolve*” (Lyons’ brief C. C. A.
9, p. 15, line 22);—

“*undisputed testimony of Appellant’s expert*”
(line 21, same brief);—

“*testimony of Appellant’s expert witness is true*”
(line 24, same brief);—

“*undisputed at any place in the record*” (line
25);—

Came, then, their client *Whitehead*—

“*All the inks bleed more or less*” (121-
11/12);—(Whitehead saying one thing)

“*Kirk was manufacturing it*” (121-11);—

“*I realized that these cards would have certain
advantages if they had a bleeding ink*” (121-
18/21);—(Whitehead saying another thing) (con-
tra 11/12)

Who could possibly believe anything of such men?

Not only making themselves untrustworthy by such
self-contradictions; they gave even the *means by which*

to make themselves still *less trustworthy* by acknowledging the *expert* to be "*true*" and "*undisputed at any place in the expert-record,*" to make the following of so much more weight *against themselves*—(only a few samples)

- (Expert): "precipitating the pigment" (100, last line);—
- " "absorb into the surface" (104-28);—
- " "bond itself into the fibre" 105-22;—
- " "some of the pigments are resistant to the action of these fluids" (95-26/27);—
- " "There is *no such thing* as a totally *soluble carbon*" (96-31/32);—
- " "*This black is the pure carbon*, and there would be *no obliteration there at all*" (97-11/12);—
- " "pigment remains after the vehicle has been washed out" (104-29/30);—
- " "*bleeding* of color is an entirely different proposition" (105-5);—

to make it definite that *not all inks dissolve nor bleed*.

A forger will, eventually, not find it so difficult, to put the precipitated pigment back under a new cover, to let the cover be the carrier; since we never leave *matter* on an open surface; and the forger should not find it so difficult to retain whatever he wants for his forgery, no doubt having practiced sufficiently not to wash, or wipe off what he means to keep in as good a shape as he may be able to manage.

Additionally, Whitehead exposed himself as being no expert, nor even any sort of man skilled in the art, by boldly testifying that—(*put under heat & pressure?*)

(Whitehead)—“*does not make any difference*” (122-11);— reinforced by a second answer—

(Whitehead)—“*not a bit*” (122-14);— having also testified Interrogatories before trial—

“Whitehead: between the two sheets and place the same in a hydraulic *hot* platen laminating press” (74-1/2) (meaning under heat and pressure);—

not easily brought into agreement with the *acknowledgedly-undisputed* expert—

“expert: *The minute heat was applied to it the red would turn to brown*” (105-30/31);—

in other words, an expert would visualize to-be-expected conditions, and make his tests accordingly, which is a common procedure of scientists, *of which Whitehead knew nothing; making his so-called test-sheet—plain bunk.*

Neither did the opposition make any effort to bring any expert, nor men skilled in the art, to contradict either defense-expert or defendant.

The claim should, therefore, stand undefeated; since, clearly, and undisputedly, having the emphasizing definition—

“TO THE EXTENT”;—

which must be connected to three distinctly-defined features—

“to disclose tampering”;—

“associated”;—

“to dissolve”;—

to be read—

“to dissolve—to the extent”;—

“associated—to the extent”;—

“to disclose tampering—to the extent”;—

(*dissolve* is thus not absolute, or to be held alone) and all of which have reference to—

“MATTER”;—

which, in turn, is a *compound* conception and *structure*, and of a particular combination in itself (45-36/44) and (46-29/37) (of transcript) as quite elaborately set forth throughout this case, and herein-before; being, furthermore, defined in the claim as —

“*distinguishing-matter*”;—

(in a similar manner as a ‘*connecting-rod*’ would not exactly be a mere *rod*, having something to connect).

MATTER has parts to co-act for distortion; and the above several features result in—

“*distortion*”;—

by any—

“*contacting-solvent*”;—

constructed so that a forger will not fancy to try.

<u>distinguishing)</u> — (to dissolve) — (TO THE EXTENT) — (reaching	
— matter) (and)	(matter
with) (associated) —	— (<i>distortion</i>
card & cover) (so as to)	(by
(disclose)	(contacting—
(tampering) —	(solvent.
— — — — —	<u>dissected claim.</u>

This whole case, and the Ballou-patent, should be deemed to be clearly defined; and the *mistakes by* and in the *District Court* should be found to be *contributing to more mistakes in the Circuit Court*, to require a *certiorari* to review both; since it must seem *impossible otherwise* to ever rectify INJUSTICE recorded—which however is in the public interest, whether I profit or not; and a reversal could be difficult without one of both, with such, and so much, interlaced contradictions. (pp. 3,⁴12, 13 here)

Though the District Court remonstrated principally against taking any action for review, on the ground of having no authority; I submitted that evident mistakes had been made in that Court, which the Court even admitted on motion-day; but denied review.

As a matter of fact: *with the first brief* submitted by my side *after trial*, with due consideration of the suggestion by the Court—

“Distr.-Ct.: It is just argument, that is all, a form of witness’ testimony” (132-16/17);—*cases were supplied*, that should easily have supported the patent-claim, on the ground that *we had new structure* besides new combination, *if gist of invention* and defendant’s testimony thereto had not been ignored, in face of Court’s own questionings during trial. (57 to 64 of transcript).

Inventions of poor fellows would be worthless; if an honest litigant is deserted by his counsel at an in-

opportune moment, if cases can be held up in lower Courts, if unjust professional purging can be practiced, and if *gist of invention can be disregarded in final adjudication* of whole patent; and, then, the Highest court could not give consideration at any time after delayed information is received that case is closed in lower Courts (8 to 10 here).

Undeniably, there is *friction* between Court-counsel and Patent-Office-counsel. *Myself* being an engineer of over 45 years standing, for over 35 years in California, and having been registered for over 25 years, to practice before U. S. Patent-Office; I encountered insurmountable *difficulties to find any good lawyer to represent me in Court as required by Court-Rules*; and the representation I had in Court speaks for itself, not at all saying anything against the integrity of the gentleman; but, of course, Courts do not help in selection of counsel and are not responsible for results; though it must leave the bad taste, visible to the public, of an attempt to eliminate an honest competitor, or *purging non-Bar members* from doing honest patentwork, *leaving undue stigma*.

It has often been said that *an inventor or a patent owner would be able to present a clear case* better than untechnical lawyers, not saying that all lawyers are untechnical, and not saying that inventor or patent-owner should take over the whole procedure; but a reasonably free testimony, and some voice under special permit of Court, could serve JUSTICE in patent

cases, and also could make it easier and simpler for Courts.

In this case, *instead of Court assuming gist; if defendant as witness had been allowed to finish his answer (62-3)*; the Court could have been saved the embarrassments, such as presented in pages herein—(pp. 14, 15, 17, 18, 19 and other places); and, if the dazed condition of defense-counsel had not been created; *pre-trial disclosures* made to the Court, such as many proofs that plaintiff-counsel was very much informed of Ballou invention as far back as even before issue of patent; and many letters to show that defendant-patent-owner had given information all over the United States, including to Kirk of whom the plaintiff testified having obtained information for his manufacture, though information from Kirk should eventually be considered information from Kruger, as far back as October 1935; the *Court quite frequently referring to such pre-trial information. (86-16/19) (37-17) (135-7) (134-17)*; should have eliminated any doubt of validity and infringement.

Under existing Court-Rules, the defendant could do nothing about the dazed condition of his counsel; but Court statements, such as—

(1) “It is just argument, that is all, a form of witness’ testimony” (132-16/17);—
and (p. 22):

(2) “I don’t know whether I understand—my experience—counsel—same” (57-16/19);—
the first statement clearly suggesting that the brief

could bring matter that otherwise would be presented by witness; to which opposition-counsel agreed by saying—

“Frederick S. Lyon: Yes. Of course, that can be brought out in a brief very well, I think to the best advantage and, that being the case, as you say, the patents speak for themselves, and we can point out anything in the patents in our argument or brief that the witness can point out in court” (132-8/13).

With this stipulation in Court, explanation on patents should be admissible in a brief; though, considering the second Court-statement, together with the just here argued Court-statement, it would seem that the Court-Rules might just be amended sufficiently to allow a defendant or patent-owner to give voice to evident mistakes or open disputes that could quickly be settled to the advantage, *for shorter records*, eliminating a lot of irrelevant nonsense.

It rests with the Supreme Court, to help the general public, and, particularly, the poor inventor.

Moreover, this Court could not possibly blame me if this case became so unduly involved and voluminous. The blame should belong to a false opposition-counsel, free to inject so much *misleading* nonsense, eventually, only due to *Court-Procedure* that has not been given a chance to advance with times; eventually even made worse.

Our Patent-Laws and Highest Court Decisions used-to-be quite-well-settled for many decades; particularly

—*disclosure in patent must be so clear that a man skilled in the art can make it*—;—

while recent Rulings suddenly practically amount to—

—*if a man skilled in the art can make it, then, the new disclosure is no invention*—.

and *that* even if, as in this case, no man skilled in the art succeeded, though it was badly needed and wanted in public life, evidenced by *over fifty (50) years of attempts with nothing but utter failures*; the opposition themselves having cited such attempts, one of them—

“Identification-Card by Barnim L. Behrendt of Chicago, Cook County, Illinois, patented in England under number 1513 of 1892”;— (5) near the bottom of the page in the printed transcript, giving number and year; and the same citation in (18);—

the reference being obviously dropped by opposition in realization of being caught on it.

In order to make anything of such known art into an “identical” anticipation of our Ballou-patent; several patents, ideas, and structure would have to be found and picked, here and there and elsewhere, other-than-just-Goodsell-Maynard and/or Walsh-Caprio; and any more pickings would still have to be reconstructed and constructed particularly as set forth in lines 36 to 44 of the patent, page 1 (45 of transcript)

and lines 29 to 37 of page 2 of patent (46 of transcript) before any such combination, or new structure would ever be effectively operative as in Ballou.

Yes—

“patent speaks for itself” (132-11)
and (57-6/9) Court and opposition agreed, and admitted; so—

**LET IT SPEAK*.*

Opposition demanded, or whined, or complained—

“Frederick W. Lyon: I would like to know the definition of the word ‘identification card’ ” (84-22/23);—

when they knew better than was pretended in Court; they being the ones to have cited all such things in their suit, only to make trouble and to make it look much.

Such falsity in Court should be stopped. The Supreme Court has the power to prescribe general Rules, and has done so. (Act of June 19, 1934, s. 651 #1).

It is humbly prayed to consider delays (pp. 8-10) favorably, and accept this petition of a layman.

PRAYER

Petitioner prays that a writ of certiorari issue to review judgments and decrees of the United States District Court and the United States Circuit Court of Appeals, that said judgments be reversed, and that this Court decide the questions of seeing to it that JUSTICE be done besides observance of Law, and deciding other questions to stop a practice that can only heap discredit on honest lawyers and an honest profession, against which there does not seem to be a chance to protect integrity and good name, but leaving the worst sort of stigma. (*Questions pp. 11, 12*)

Respectfully submitted,

OTTO H. KRUGER,
Otto H. Kruger, Petitioner.

STATE OF CALIFORNIA,)
) ss.
County of Los Angeles,)

Otto H. Kruger, being first duly sworn, deposes and says, that he is the petitioner named in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true, including statements on the Ballou-File-Wrapper misappropriation stated in page 51 hereinafter, and whole matter of 50.

OTTO H. KRUGER,
Otto H. Kruger.

Subscribed and sworn to before me
this 4th day of June 1947.

Jessie M. Williams

Notary Public in and for the County
of Los Angeles, State of California.

My commission expires October 18, 1950.

In the
SUPREME COURT OF THE UNITED STATES

Otto H. Kruger,
Petitioner,

vs.

Ned Whitehead, doing business
under the fictitious name of
Whitehead & Co.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI

Opinions and Judgments

The extreme self-contradicting nature of opinions and judgments is so absolutely evident from the foregoing petition, that it should be understood if time were available for this Court to study the whole matter carefully.

Many totally unfounded assertions had been made by the opposition, and the Trial Court was misled thereby, to become inclined to assume conditions that are absolutely *contrary to evidence and very plain and well-known facts*.

The cause of all the trouble, undeniably, is in the fact that the Memorandum-Opinion of the District-

Court is based on a rash *disregarding of the gist* of invention.

It is difficult to conjecture on the reasoning of the lower Courts in avoiding review, considering the *irreconcilable contentions*, set forth in pages 12 and 13 of these papers, to make p. 13—"decree affirmed" of the Circuit Court incomprehensible.

Moreover, the *self-contradicting* p. 17 of the District Court is even self-condemning, considering District-Court's *acceptance of the expert*, who had testified quite adversely.

The District Court then *blaming* witness-defendant pp. 17 to 21, must seem unpardonable, coming from the Bench, which *added even insult* to the previous blaming when *ignoring the testimony* of the witness entirely several weeks later in the Court-Opinion, on the points of *Compound-matter* on which the Court had made so much effort in procuring it.

Pages 14 to 17, on the other hand, show the *Lyons'* efforts, to do their part, to confuse the issue, and to *daze defense-counsel* to the detriment of defendant and Justice.

The *undue arguments* while witness-defendant was on the stand, the *cutting-off and distortions of witness'* testimony, and *not allowing witness to finish* a short and plain statement on the claim, by which the Court action could have been very short and effective; pp. 18 to 23 *not exactly making PROCEDURE more dignified* to a plain honest layman.

Invention and Cases Supporting It

(a) The *very preamble* (45) of the Ballou-patent defines this patent as being for—

“devices used by an individual person for the sake of identification before, or to, or with another person”;—

further down in the patent-specification giving us a clearer definition of true identification-*distinction*—

(1) “it *must* contain something that is original and distinctive with or by the holder”;—

(2) “*furthermore* be in a form to be quickly and readily recognized as such”. (lines 36-44)

Two distinct parts in MATTER as a minimum-stipulation, to make it the—

“*DISTINGUISHING-matter*”

of the claim; and making it—

“A positive and reliable identification.” (line 42)

Opposition’s cry for definition of “identification-card” (p. 36 herein) (84-22/23) is, thereby, made the *worst pretence*, just childish-ridiculous, and irrelevant to the issue.

The above-recited *part (2) of matter* is undeniably set forth throughout the patent specification *elaborately*; particularly, in the second column of page 1 (45) (18-25).

(b) With the District Court's—

“... witness' testimony” p. 2, a-3 in full;—
and with the 'Trial-Day-Finale—

“... quite unique” p. 2, a-1 in full;—

it should be deemed to have been reasonably-to-be-ex-
pected, that the Court would give some weight to its
own questionings of the witness-defendant (57 to 64
and other places in the transcript) (here in part, pp.
13 to 23);—whereby it had been emphasized that *MAT-
TER is compound*; comprising the new *co-actingly-
constructed feature (1)-(2)* of the previous page here;
—besides new combination of this new structure to-
gether with the two other features of being *securely
encased and having a coloring*;—by which all these
features are *uniformly co-acting*;—

uniformly between (1)-(2);—and—

uniformly between cover and (1) and (2);—

furthermore, since the cover is adhering to card and
1-2, but capable of being distinguishably released in
the same manner, it is also—

uniformly between cover, (1), (2) and card;
this being positively and completely novel.

(c) *Direct co-acting of any sort of (1), with any
sort of (2) in one of, either face does not exist in
either, Goodsell-Maynard, nor in Walsh-Caprio; nor
in any sort of combining of those two patents;—(in
the words of)—Appeal-Board:*

“references show the solubility of the ink and film
in a common solvent but for an entirely different

purpose and the adoption of this idea in the Goodsell et al structure would have no object at all" (53-22/26).

Though this Appeal-Board's-Decision referred to other patents of the same nature, the application to the combining of Walsh-Caprio and Goodsell-Maynard is obvious, to condemn the opposition's attempt as what it is.

This reference to the Patent Office Appeal Board's Decision makes it clear that Goodsell-Maynard did not have the ink; but other references did have it, cited together with the Goodsell-Maynard patent by the Primary-Examiner out of the Office File and submitted to the Board of Appeals.

Moreover, common public knowledge, in fact *every-day-experiences of the whole PUBLIC*, is sufficient to settle the question; that a common "*CHECK*", or any similar paper is *no identification*; no matter if it shows the *name of the bearer on the best of so-called safety-paper, or on pretty picture, such as Walsh-Caprio*;—no identification.

Goodsell-Maynard could not possibly help Walsh-Caprio;—since the Goodsell- definitely sets forth specifically—p. 16 here—having *only one thing on one face, and another one thing on opposite face*; to make Lyons' attempt along this line only their well-practiced and often-injected *same old prevaricating and equivocating*; or, in the words of the Appeal-Board—

“would have no object at all” to combine those two old patents either way *pretended*.

There would, then, still be nothing to co-act in either face; neither of those parties having had any such idea along such lines.

A forger can easily split their cards, easily recognizing the different parts on separate faces (the Patent-Office-Experts having visualized that possibility) (the real reason for the rejection of claim 6); *throw away the undesired half*; glue another desired half to the back of the retained half; to make it a perfect forgery, which no expert could possibly detect on a mere glance.

This *Appeal-Board's Decision* was, therefore, made the *principal exhibit by defendant*, without any sort of hesitation for the *success of his case*, as a *piece of known art* on the points of solvent and ink, in which the inventor, and here also the defendant relied for the *new structure, and new combination with such old art*.

One will have to pick here, and there, and elsewhere, etc.; and, then, construct it according to (a, p. 41 and pp. 29-30 herein); before it becomes effective as in the Ballou patent.

It would, then, be ridiculous, and preposterous, to follow opposition's contention, that Goodsell-Maynard and/or Walsh-Caprio could ever possibly in any way or manner anticipate the Ballou patent 2,038,567.

It is also preposterous, for the opposition to now cry that Kruger is estopped from claiming anything else; when Kruger has three times in almost direct succession in one page of the pre-trial Deposition answered the Lyons in their office under oath, that ink or solvent is not the invention when taken alone but can be had on the open market; furthermore, that the claim is of a “contracted”—form, with reference to the—

“phrase, ‘To the extent’ . . .”, page 5, Dep.; — and Kruger has maintained the same thing ever since; never anything else.

It is the Lyons, who have prevaricated and equivocated until no one seems to know where they stand, that even the Courts are misled to fall into contradicting—statements, to make Opinion and Judgments what they now are.

The Lyons did not advise their client Whitehead to use the non-co-acting combination of Goodsell-Maynard added to the-just-as-irrelevant-Walsh-Caprio! NO! Quite obviously, the Lyons, rather, INDUCING *their client Whitehead to copy the Ballou-patent most closely and accurately, AND ADVERTISING the fact of their copy (71); thereby admitting invention in infringed Ballou-patent; because—quite evidently—they could never have sold their product to the many users they are giving us in such of their lists of ad-*

vertisings (71) (transcript) in any other form but Ballou's.

The Ballou patent, most certainly, *must* be deemed to have *other parts besides just ink in MATTER* than could be possibly found in their two *pretend-combined-references*, to make such a perfect identification in Ballou, worthwhile to be copied most closely.

(d) In other words, the Ballou-patent has points (1) (2) p. 41 herein, only needing a showing of cases in support. (*submitted before Opinion and before Judgment*).

Peculiarly, *such cases* were submitted with the *briefs after trial* under demand of the District Court for such cases, and *they have been in the hands of the Courts ever since*; only, obviously, *never having been applied to the gist of invention* here elucidated. *WHY NOT?*

(d-1)—Taking *known elements* used in a patent—Loom Co. v. Higgins, 105 U. S. 580, at page 586 makes it clear that a patentee is not obliged to specify or detail such things, as here ink, or solvent, or manufacturers; which should favor our case, especially when it was acknowledged throughout this case, even by the Courts, that such things were of common knowledge, Mr. Justice Bradley having pointed out that one may begin—

“at the point where his invention begins, and describe what he has made that is new, and what is replaced of the old.

That which is common and well known is as if it were written out in the patent and delineated in the drawings”.

(d-2)—as to *man skilled in the art*. *Whitehead* never established himself as an expert, nor even as a man skilled in the art by his self-contradicting; Court saying—

Distr. Ct.: “who is not an expert, because he said he was a salesman until he started in his own business in 1942” (135-10/11);—

while in *American Stainless Steel Co. v. Ludlum Steel Co.*, 290 Fed. 103, at p. 107—

“It follows that we are of opinion that these patents are to be interpreted in the light of what their disclosures would mean to one accustomed to the art of making steel, or to a metallurgist, and not to one who was concerned only with the forming thereof into implements of industry”;—

the application to our case being obvious.

(d-3)—*broad claim—variations*. Courts commonly accept the viewpoint that claims can be written broadly so as to include reasonable variations; thus we find in—*Minerals Separations, Ltd. v. Hyde*, 242 U. S. 261, at 270—

“... variation of treatment must be within the scope of claims ... *certainty which the law requires in patents is not greater than is reasonable* ... obviously impossible to specify in a patent the precise treatment which would be most successful and economical in each case ... while leaving something to the skill of persons applying the invention ... *sufficiently definite* to guide those skilled in the

art to its successful application . . . *This satisfies the law*” Other cases agreeing—(emphasis mine)

Mowry v. Whitney, 14 Wall 620, 20 L. Ed. 860;

Ives v. Hamilton, 92 U. S. 426;

Carnegie Steel v. Cambria 185 U. S. 403; 46 L. Ed. 968.

(d-4)—*Opposition's and Court's mistaken interpretations.* Did plaintiff in his advertisings mean a plain calling card? When he praised his “identification-card”? Courts have said a lot about such things, and that type of infringers, as in *Railway Co. v. Sayles*—

“We see the strength of the concessions to its advance beyond the prior art and of its novelty and utility by . . . imitation of it . . . The patented organization must be one that is essential. Its use in the precise form described and shown in the patent must be inevitably necessary” in principle agreed to by—

Diamond Rubber Co. v. Consol. Tire Co., 220 U. S. 428, pp. 440, 441.

Practically the same viewpoint being expressed—

“The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think”

Kurtz v. Belle Hat Lining Co., 280 Fed. 277, C. C. A. 2.

(d-5)—besides new structure; *combination*. (p. 42 here) Cantrell et al. v. Wallick, 117 U. S. 689, Mr. Justice Wood saying—

“The first defense is based on the theory that a patent cannot be valid unless it is new in all its elements as well as in the combinations, if it is for a combination. But this theory cannot be maintained.”

(d-6)—*evidence of invention* by many years of utter failures, need of product in public, attempts.

In Carnegie v. Cambria, 185 U. S. 403, 46 L. Ed. 968—

“it did not, for years, occur in this light to even the most skillful persons . . . now that it has succeeded, it may seem very plain. . . . This is often the case with inventions of the greatest merit. . . . it is evidence of invention.”

In our case, the opposition cited the English patent 1513 of 1892, over fifty (50) years old; showing that attempts have been made for many years, though all obviously utter failures, and not practical as our Bal-lou; opposition avoiding to get their own reference printed in the transcript, obviously only, not to be condemned on their own reference; but it is noted twice (5) and (18).

Yes, as the District Court said—

“District Court: As I understand the law, those claims must be considered with the evidence”

134-13/14);—

and the evidence, in this case, ought to be deemed entirely in favor of sustaining the Ballou-patent; since the opposition did not make any honest attempt, or effort, to bring any honest evidence.

If the case were so clearly in favor of opposition;—and if *opposition honestly believed* anybody to be able to produce adverse evidence;—why should they have had to *stoop to inducing their client*, plaintiff Whitehead, to *impeach himself*;—and why should even plaintiff's counsel *both of the Lyons*, have had to *impeach themselves* on their official oath, with the *worst sort of falsehoods* and repeated attempts to mislead the Courts?—

Starting even before trial in their pre-trial-brief, saying—

“This patent was not referred to in the proceedings before the Patent Office leading to the grant of the Ballou patent and the usual prima facie presumption of validity of the Ballou patent is thereby overcome” (lines 26 to 29 of their brief of July 13, 1944);—

while, in fact, the patent had been cited early and was the *principal reference all the way through*; the *primary Examiner had it*, he carried it to the *Board of Appeals*, not only used to refer to it, but the Board made it the principal reference on which to rule, overruling this reference, and allowing therewith the broadest claim of the Ballou patent, thus to be issued in claim 1.

An infringing layman; particularly, when he *proves himself untruthful, brazenly contradicting himself within moments; should not be able to invalidate a patent* against which no proof of fault has been brought by opposition in any part of *any sort of evidence*.

Lyons even misappropriated Ballou's File Wrapper, from which they, as lawyers, could not possibly have denied, the above quotation to be *brazen falsehood*; Frederick S. Lyon bluntly telling me after trial (walking with me out of Court to escalator) that the *File* they had just then introduced as their evidence *was Ballou's, thereby mine, and I could ask Court for it*;—after they had refused my counsel to return it, saying it was their's. (oath p. 38)

JURISDICTION

Under the extremely contradicting nature of the handling in the lower Courts, it is humbly pleaded that the Highest Court alone has the power (Act of June 19, 1934, s.651 #1) to rectify the extreme travesty of justice; by giving consideration to official misinformation had. (pp. 8 to 10.)

Notice of the mandate having been recalled to the upper Court from the District Court, p. 8; the Clerk of C. C. A. 9 mailing me a carbon copy of letter he sent to Clerk of District Court, p. 9; and the Clerk of the District Court, then, informing me of holding mandate for spreading upon the minutes of the Court, p. 10;—had to cause me to follow the lead for trying to get reconsideration, or review; which hindered me doing anything else; leaving me without knowledge, or any sort of notice, of any closing of case until *May 12, 1947*.

Gist of invention disregarded entirely—only in favor of or based on falsehoods, pp. 26, 28; *against true, undisputed, testimony*, pp. 26, 27—when District Court accepted as such, p. 17;— leaving no real honest judgment in this case.

CONCLUSION

Litigants, even a poor inventor, or any poor fellow, should have the assurance, that *gist of invention* will not be ignored in the final adjudication of patents; and that such extreme travesty of JUSTICE, as here presented, *can* be rectified; to get a *reversal of previous judgments*; and, therewith, get *recompense of expenses and losses*, caused by an unscrupulous, self-contradicted, untrustworthy, plaintiff-counsel, without having had any cause, since not having proved any damage or anything of his complaint; and *also get validation of patent, injunction and accounting*, against such counsel and client.

The Supreme Court of the United States, having established the Rules, has the capacity to rectify undue advantages taken by others, that Justice may prevail besides observance of law.

It is respectfully submitted that Rules may provide, that a *litigant be informed in reasonable time*, if, and when, petitions, or other side-issues are found so; that the case *should be considered ended and closed* in any of the lower Courts, or Departments, *only after such due notice*; so that eventual chances with higher Departments are *not unduly forfeited inadvertently*, due to lack of notice, *by the litigant*.

Respectfully submitted,


OTTO H. KRUGER,

Otto H. Kruger, Petitioner.